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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 138

WILLIAM Z. FOSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

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as respondent appears now to concede, is decisive in determining petitioner's constitutional claim. For, as we urge in the petition (pp. 23-24), the interest of Government which justifies the imposition of restraints on essential liberties must be a substantial and compelling one. If petitioner can never be brought to trial, the Government not only has no substantial or compelling interest to justify the restraint on petitioner's right to travel it has no interest whatever. Thus Judge Feinstein abdicated his judicial function in declining to rule on the only question of fact which could give content to this interest.

Petitioner urged in the court below that Judge Feinstein was in error in refusing to rule on this question. The court below made no finding on this claim of error. We urge in the petition for a writ of certiorari that the failure of the courts below to rule on this question not only constitutes an error in law but also constitutes an abuse of judicial discretion. For, as we said in the petition (at p. 20): "In view of the encumbrance on petitioner's right to travel imposed under the conditions of bail and particularly since the restraint is of lifetime duration it was the duty of the court to determine whether the restraint was necessary. 'When it is shown that state action threatens significantly to impinge on constitutionally protected freedoms it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' *Bates v. City of Little Rock*, 361 U. S. 516, 525."

We respectfully submit that the failure of the courts below to perform this judicial duty and the fact that its decisions were made in utter disregard of the crucial facts of record constitute such a departure from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision.

Respondent proposes to overlook the failure of the court below to make a finding as to what respondent now concedes to be a necessary premise. It advises this Court that [brief in opposition p. 10]:

> "In the event this position is denied, the Government intends promptly to take appropriate action in the district court to determine whether the petitioner now is in possession of his mind to stand trial and, if not, what is the likelihood that he can be tried. The Government will attempt to make sure that court-appointed doctors make a thorough examination as is necessary in order that the court can and the courts can make the proper disposition of [illegible] in this case."

We respectfully submit that a "proper disposition of the issues in this case" cannot be made on this record. For it plainly establishes that petitioner was never afforded trial. Moreover, respondent proposes to obtain examination of petitioner only by court-appointed doctors—not by [illegible]. The contention that every opportunity to seek such a medical examination during the proceedings before the District Court. It was not a matter [illegible] fact at [illegible] had the opportunity to [illegible] the evidence was presented. That it did not choose [illegible] to avail itself upon respondent's basis for [illegible] court opportunity more than two years after the proceedings were instituted. Such an opportunity [illegible] the purpose of further delaying the relief [illegible] at least [illegible]. During the two years in which these proceedings have been pending petitioner has been deprived [illegible] opportunity to [illegible] his [illegible]. He is now [illegible] years of age [illegible] to wait.

For the foregoing reasons and for all of the reasons advanced in the petition it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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